No. 93-168

FILED
JUL 29 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1993

MARK C. THOMPSON,
Petitioner,

v.

State of Michigan,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT
And APPENDIX

FRANK G. BECKER
BECKER & VAN CLEEF, P.C.
Counsel for Petitioner
18501 West Ten Mile Road
Southfield, Michigan 48075
313/569-4910

31pp

QUESTION PRESENTED FOR REVIEW

Did the Michigan Courts err in refusing to suppress a statement made by petitioner in clear violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602; 16 L. Ed.2d 694 (1966) on the basis that *Duckworth v. Eagan*, 492 U.S. 195; 109 S.Ct. 2875; 106 L. Ed.2d 166 (1989) alleviated the requirement that the petitioner be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation?

LIST OF PARTIES

The petitioner is Mark C. Thompson. The respondent is the State of Michigan.

TABLE OF CONTENTS

	PAGE
Question Presented for Review	ii
List of Parties	iii
Index of Authorities	v
Opinions Below	vi
Jurisdiction	vi
Constitutional Provision Involved	vi
Statement of the Case	1
Reasons for Granting the Writ	
I. THIS WRIT MUST BE GRANTED AS THE MICHIGAN COURTS HAVE ERRONEOUSLY ERODED KEY FIFTH AMENDMENT PROTECTIONS AFFORDED BY THIS COURT.	6
Relief Requested	13

APPENDIX

Opinion of Michigan Court of Appeals affirming conviction dated May 14, 1992	1a
Order of Michigan Supreme Court denying application for leave to appeal	11a

INDEX OF AUTHORITIES

CASES:

Brown v. Heyd, 277 F.Supp 899 (Ed LA 1967) 12

California v. Prysock, 453 U.S. 355 (1981) 9,10

Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L. Ed.2d 895 (1966) 10

Duckworth v. Eagan, 492 U.S. 195; 109 S.Ct. 2875 (1989) 7,8,9

Edwards v. Arizona, 451 U.S. 477, 68 L. Ed.2d 378, 101 S.Ct. 1880 (1981) 10

Groshard v. United States, 392 F.2d 172 (9th Cir. 1968) 12

McNeil v. Wisconsin, 501 U.S. 115, L. Ed.2d 158, 111 S.Ct. (1991) 11

Minnick v. Mississippi, 498 U.S. ____, 12 L. Ed.2d 49, 111 S.Ct.____ (1990) 11

Miranda v. Arizona, 384 U.S. 436, 471-472 (1966) 6,7,9

Sullins v. United States, 389 F.2d 985 (10th Cir. 1968) 12

United States v. Fox, 403 F.2d 97 (2nd Cir. 1968) 11

Windsor v. United States, 389 F.2d 530 (5th Cir. 1968) 12

OPINIONS BELOW

The relevant opinion of the Michigan Court of Appeals and order of the Michigan Supreme Court denying the petitioner's application for leave to appeal are reproduced in the Appendix beginning at p. 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

This petition is filed within 90 days of the Michigan Supreme Court's ORDER DENYING PETITIONER'S APPLICATION FOR LEAVE TO APPEAL on April 30, 1993.

CONSTITUTIONAL PROVISION INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A.) Assertion of federal right in Court's below.

Your petitioner asserted his federal right pursuant to the Fifth Amendment of the United States Constitution to suppress his statement in the trial Court prior to his trial, during the trial, in the Court of Appeals and in the Michigan Supreme Court. The petitioner's timely assertion of his federal right is reflected in the attached Opinion of the Michigan Court of Appeals. The respondent has never claimed that petitioner failed to assert his federal rights.

B.) Factual recitation.

Detective Michael Maison, who was assigned to a special investigation division from the Roseville police department, was the **sole** witness, testified petitioner actively participated in a drug transaction (Tr. 4/17/90, pp. 74-141). The subject of the police investigation was not the petitioner, but Joseph Stachowiak. While Mark Thompson denied any knowledge or participation in a drug transaction (Tr. 4/18/90, pp. 23, 31), Maison testified that the petitioner gave drugs to Stachowiak who in turn gave the drugs to Maison in exchange for money (Tr. 4/17/90, pp. 82-83).

Following the testimony of Maison, the defendant, Mark Craythorn Thompson, was convicted by a jury of delivery of over 50 grams but less than 225 grams of a controlled substance containing cocaine. Defendant was sentenced to serve a term of five to twenty years in prison.

Joseph Stachowiak did not testify at the defendant's trial. Certain statements made by Joseph Stachowiak were allowed into evidence allegedly under the co-conspirator exception to the hearsay rule. (MRE 801(d)(2)(E))

At the trial of this case, Officer Maison was allowed to testify that the petitioner allegedly made the following incriminating statement to him:

> Mr. Thompson stated that he wasn't really a cocaine dealer but that he did proceed to Stachowiak's house that evening and did deliver or bring to me [sic] the four ounces of cocaine. Mr. Stachowiak - or Mr. Thompson was then advised by myself of what the unit felt his participation was that evening and prior occasions and he nodded in the affirmative (Tr. 4/17/90, pp. 109-110).

The alleged interrogation of Mr. Thompson, took place approximately 15 hours after his arrest (Tr. 8/24/89, p. 13). Although Maison had allegedly typed the report regarding the

statement shortly after it was allegedly made, the "statement" was not made known to petitioner's counsel until May 9, 1989, nearly a nine (9) month delay (Tr. 8/24/89, p. 12).

Mark Thompson unequivocally and categorically denied, and continues to deny, making any statement to Maison (Tr. 8/24/89, pp. 19-20); (Tr. 4/17/90, pp. 173-174). There was no dispute that Maison attempted to elicit the "cooperation" of your petitioner regarding further narcotic investigations following his arrest (Tr. 8/24/89, p. 19); (Tr. 4/17/90, pp. 173-174). There is also no dispute that Mr. Thompson was not allowed to use the phone prior to his interrogation. Mr. Thompson was told, by Maison, that using the phone was a privilege and not a right (Tr. 4/17/90, p. 174). There was no testimony by Maison at the hearing, the preliminary examination or within the trial transcript that an opportunity for Thompson to use the phone was afforded.

The police officer, Maison, did not sign any statement nor was any *Miranda* type form given to Thompson which he allegedly signed. The *Miranda* rights were conveyed to Thompson verbally, based on the memory of Maison. That is, Maison allegedly indicated to Thompson his Miranda rights

based on Maison's recollection, without the aid of any written document. As Maison testified at the pre-trial hearing:

> Q. Did you read them from a card or do you have those memorized?
> A. I did not read them from a card. I dictated them from my memory.
>
> (Tr. 8/24/89, p. 5)

The Michigan Court of Appeals accepted the testimony of Maison as to his version of the *Miranda* warnings:

> Defendant brought a motion to suppress the statement which resulted from the questioning of defendant by officer Maison, and an evidentiary hearing was conducted. At the hearing, officer Maison testified that upon defendant's arrest, defendant was given his *Miranda* warnings, which the officer recited to defendant from memory. Officer Maison testified that defendant was advised that he "had a right to remain silent; anything he said can be used against him in a Court of law; you do have the right to have an attorney; you don't have to answer any questions and if you do start answering questions you may stop at any time; you have the right to have an attorney and if you do not have one, one can be appointed to represent you by the Court." Officer Maison testified that he asked defendant if defendant understood those rights and defendant acknowledged that he did.

> Subsequently, officer Maison interviewed defendant in the holding cell. Prior to the interview, Maison again recited from memory the above *Miranda* warnings, which defendant acknowledged to have understood. It was at this time that defendant made the statement which became the subject of his motion to suppress. The motion was denied by the trial Court. (Opinion of Court of Appeals, p. 1)

As previously quoted, and found by the Michigan Court of Appeals, the investigating officer, Maison, failed to give or even claim to give complete Miranda warnings. **The warnings were completely deficient as to the petitioner's right to consult with and have a lawyer with him during interrogation.** Moreover, Mr. Thompson, who was not allowed to make a phone call to a lawyer or anyone during the approximate 15 hours that he was held prior to alleged incriminating statement, **never, according to Maison, made a knowing waiver of his right to consult with or have attorney with him.** This is the precise reason why written Miranda waiver forms bearing arrestee's signature are utilized by all police departments, especially for custodial interrogations. This form was, indeed, utilized by the City of Roseville Police Department. However, Maison testified that he did not use this form and that he usually

did not interrogate suspects (Tr. 8/24/89, pp. 9-10, 15). There certainly were no circumstantial guarantees of truthfulness which in large part prompted this Court's decision protecting Fifth Amendment rights.

The Michigan Court of Appeals on May 14, 1992 in an unpublished Opinion affirmed the petitioner's conviction. The Michigan Supreme Court refused to hear petitioner's appeal by declining petitioner's application for leave to appeal on April 30, 1993.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review the decision of the Michigan Court of Appeals because that decision conflicts with Supreme Court precedent including apprehending a fleeing nonviolent felon, *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966).

ARGUMENT

THIS WRIT MUST BE GRANTED AS THE MICHIGAN COURTS HAVE ERRONEOUSLY ERODED KEY FIFTH AMENDMENT PROTECTIONS AFFORDED BY THIS COURT.

In *Miranda v. Arizona*, 384 U.S. 436, 471-472 (1966), among the rights that were held essential to be conveyed prior to interrogation of a suspect, for which an explicit waiver was necessary, was the right to have consultation with a lawyer and for the lawyer to be present during the interrogation:

> '[W]e hold that an individual held for interrogation *must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation* under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in the evidence against him, *this warning is an absolute prerequisite to interrogation*. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.' (emphasis added)

In *Duckworth v. Eagan*, 492 U.S. 195; 109 S.Ct. 2875 (1989) this Court indicated that the right to have a lawyer may be couched in terms of "if and when you go to Court". However, *Duckworth*, contrary to the Michigan Court's interpretation, did not indicate that it was permissible not to give an enumeration of rights statement to the arrestee but that it was permissible to couch this advice of the right to counsel with the limitation of "if and when you do go to Court". Indeed, *Duckworth*, emphasized

that a stricter standard is held for station house questioning:

> Miranda has not been limited to station house questioning, see *Rhode Island v. Innis,* supra (police car), and the officer in the field may not always have access to printed *Miranda* warnings, or he may inadvertently depart from routine practice, particularly if a suspect requests an elaboration of the warnings.
>
> (492 U.S. at 203, 106 L. Ed.2d at 177)

This *Duckworth* Court emphasized that there was no departure from *Miranda* in any respect whatsoever. Indeed, the Court declared that the warnings must touch "all of the bases:"

> We think the initial warnings given to respondent touched all of the bases required by *Miranda*. The police told respondent that he had the right to remain silent, that anything he said could be used against him in Court, **that he had the right to speak to an attorney before and during questioning,** that he had "this right to the advice and presence of a lawyer even if [he could] not afford to hire one," and that he had the "right to stop answering at any time until [he] talked to a lawyer." 843 F.2d, at 1555-1556. As noted, the police also added that they could not provide respondent with a lawyer, but that one would be appointed "if and when you go to Court."
>
> (492 U.S. at 203, 106 L. Ed.2d at 177) (emphasis added)

The *Duckworth* approved warnings were a far cry from the oral *Miranda* warnings which were allegedly given by Maison

without the use of the written waiver form, although such a form was available. (Defendant's Trial Exhibit One) Considering the palpable deviation from the *Miranda* warnings, together with the failure to allow Mr. Thompson to make a phone call or to obtain a specific acknowledgement of the waiver of the right to counsel, it is quite evident that the alleged incriminating statements should never have been admitted into evidence. This was a clear violation of the plaintiff's constitutional rights against self incrimination as protected by *Miranda v. Arizona.*

It is also significant that this Court in *Duckworth* was responding to a split of lower Court authority concerning whether the "if and when you go to Court" language was consistent with *Miranda.* (Please refer to footnote 2 of the *Duckworth* decision, 492 U.S. at 201, 106 L. Ed.2d at 175.

Also, strongly indicative of this Court's wish not to dilute the warnings contained in *Miranda* is *California v. Prysock,* 453 U.S. 355 (1981). In *Prysock,* the United States Supreme Court reiterated that it was necessary for the police to convey to the arrested person his right to have a lawyer present prior to and during all phases of the interrogation.

In sharp contract to *Prysock,* in the instant case, there is no contention that Mr. Thompson was reasonably advised that he had the right to consult with an attorney and that he had the right to have an attorney present during the questioning. In point of fact, without being afforded the right to make a phone call, Mr. Thompson most assuredly had no such understanding. Indeed, the exact opposite conclusion would reasonably be drawn.

Also, in *Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L. Ed.2d 895 (1966), a confession was rendered inadmissible based on a Fifth Amendment violation. The *Davis* "confession" was deemed to be inadmissible because Davis was not allowed any contact with anyone except police officers. Following 16 days of detention his so called confession was made. Although the delay in this case was not as long, it occurred during the most critical early stages after arrest and was combined with promises of leniency for cooperation.

The significance of the deviation from *Miranda* in this case can not be underestimated. The importance of the right to have counsel present during the interrogation has been iterated and reiterated by this Court. In *Edwards v. Arizona,* 451 U.S. 477,

68 L. Ed.2d 378, 101 S.Ct. 1880 (1981) this Court held that an accused who invokes the right to counsel while undergoing custodial interrogation is not subject to further interrogation until counsel has been made available to the accused.

Later, in *Minnick v. Mississippi*, 498 U.S. ____, 12 L. Ed.2d 49, 111 S.Ct. ____ (1990) this Court held that a police officer could not reinitiate custodial interrogation of an accused without counsel being present after the accused had requested and had consulted with counsel. This was so despite the fact that counsel was not re-requested (by the accused) during the second interrogation. See also *McNeil v. Wisconsin*, 501 U.S. 115, L. Ed.2d 158, 111 S.Ct. (1991). (No violation where different charges were involved as defendant was appointed an attorney for a prior charge.)

A case which is virtually identical to the instant one is *United States v. Fox*, 403 F.2d 97 (2nd Cir. 1968). In *Fox*, the United States Court of Appeals held that the warnings given in that case were inadequate primarily because nothing was said to defendant about his right to have an attorney appointed prior to questioning if he could not afford one. In that case, the warnings

were inadequate primarily because nothing was said about defendant's right to have an attorney appointed prior to questioning if he could not afford one. Indeed, warnings which have failed to advise a suspect that he has a right to the presence of an attorney during questioning have frequently been found fatally defective. This is quite understandable because **of all rights given, this one most accurately affects the plaintiff's relationship with an attorney prior to questioning.**

Obviously, this also implicates the Sixth Amendment Right to have appointed counsel as well. Among the cases which have declined to depart from *Miranda* regarding this critical issue are *Windsor v. United States,* 389 F.2d 530 (5th Cir. 1968) (Defendant was only informed that he could consult with a lawyer before questioning.); *Groshard v. United States,* 392 F.2d 172 (9th Cir. 1968) (Defendant, as in this case, was only told he had a right to get an attorney anytime he wanted one.); *Brown v. Heyd,* 277 F.Supp 899 (Ed LA 1967) (Defendant, as in this case, was only informed that he had a right to an attorney.)

Also relevant is *Sullins v. United States,* 389 F.2d 985 (10th Cir. 1968). In *Sullins,* the alleged confession of the defendant

was ruled inadmissible because of the absence of any specific declining of consultation with a lawyer before questions were asked. Of course, no waiver was found, or ever claimed, in the instant case.

Never has this Court retreated from *Miranda,* supra. The failure of the Michigan Courts to respect this Court's clear pronouncements should not be ignored. This Writ of Certiorari must be granted.

RELIEF REQUESTED

Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Michigan Court of Appeals as allowed to stand by the Michigan Supreme Court.

Respectfully submitted,

FRANK G. BECKER
BECKER & VAN CLEEF, P.C.
Counsel for Petitioner
18501 West Ten Mile Road
Southfield, Michigan 48075
313/569-4910

July 29, 1993

APPENDIX TO PETITION FOR CERTIORARI

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

May 14, 1992

v

No. 130466

MARK CRAYTHORN THOMPSON,

Defendant-Appellant.

Before: Wahls, P.J., and Jansen and T. G. Kavanagh,* JJ.

PER CURIAM.

Defendant, Mark Craythorn Thompson, was convicted by a jury of delivery of over 50 grams but less than 225 grams of a controlled substance containing cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant, sentenced to serve a term of five to twenty years in prison, now appeals as of right. We affirm defendant's conviction and sentence.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment.

Defendant first contends that his Fifth Amendment right against self-incrimination was violated because officer Maison did not give defendant his complete *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602; 16 L. Ed.2d 694 (1966). Specifically, defendant asserts that officer Maison failed to inform defendant, prior to questioning, that defendant had a right to consult with an attorney prior to and during questioning, and to have the court appoint an attorney, if defendant could not afford one, prior to questioning.

Defendant brought a motion to suppress the statement which resulted from the questioning of defendant by officer Maison, and an evidentiary hearing was conducted. At the hearing, officer Maison testified that upon defendant's arrest, defendant was given his *Miranda* warnings, which the officer recited to defendant from memory. Officer Maison testified that defendant was advised that he "had a right to remain silent; anything he said can be used against him in a court of law; you do have the right to have an attorney; you don't have to answer any questions and if you do start answering questions you may stop at any time; you have the right to have an attorney and if you

do not have one, one can be appointed to represent you by the Court." Officer Maison testified that he asked defendant if defendant understood those rights and defendant acknowledged that he did.

Subsequently, officer Maison interviewed defendant in the holding cell. Prior to the interview, Maison again recited from memory the above *Miranda* warnings, which defendant acknowledged to have understood. It was at this time that defendant made the statement which became the subject of his motion to suppress. The motion was denied by the trial court.

In *Miranda,* the Supreme Court established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments prior to custodial interrogation. 384 U.S. at 478-479. The suspect must be informed that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires. *Id.* The accused must be "adequately and effectively" appraised of his rights, and the

exercise of those rights must be fully honored. *Id.*, p. 467.

In a more recent opinion, *Duckworth v. Eagan*, 492 U.S. 195; 109 S.Ct. 2875; 106 L. Ed.2d 166 (1989), the Supreme Court stated that it has never insisted that *Miranda* warnings be given in the exact form described in that decision. 492 U.S. at 202. The warnings required and the waiver necessary in accordance with *Miranda* are, "in the absence of a fully effective equivalent," a prerequisite to the admissibility of any statement made by a defendant. 492 U.S. at 202. The rigidity of *Miranda* does not extend to the precise formulation of the warnings given a criminal defendant, and no "talismanic incantation" is required to satisfy its strictures. 492 U.S. at 202-203.

We are of the opinion that officer Maison "touched all of the bases" when he gave the *Miranda* warnings to defendant. 492 U.S. at 203. The officer informed defendant that he had the right to remain silent, that anything he said could be used against him in court, that he had a right to speak to an attorney, that an attorney "can be appointed" to represent him if he could not afford one, and that defendant could stop answering questions at any time.

Officer Maison was not required to use the precise formulation of the warnings as stated in *Miranda*, but rather, was only required to reasonably convey to defendant his rights as required by *Miranda*. 492 U.S. at 203. The purpose of the cautionary admonition of constitutional rights is to make certain that persons about to undergo custodial interrogation are aware of and understand their "right to silence and to counsel." *People v. Godboldo*, 158 Mich. App. 603, 606; 405 NW2d 114 (1986).

Officer Maison adequately and effectively informed defendant of his rights as required by *Miranda*, and defendant acknowledged that he understood those rights. The fact that officer Maison relied on his memory to convey these rights to defendant is of no import. The use of a printed rights form is not required, and this was acknowledged in *Duckworth*, where the Supreme Court stated that the officer in the field may not always have access to printed *Miranda* warnings, or he may inadvertently depart from routine practice. 492 U.S. at 203. *Miranda* warnings are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected. 492 U.S. at 203. We are of the

opinion that the warnings given to defendant by officer Maison reasonably conveyed to defendant his rights as required by *Miranda*. The trial court did not err in admitting the statement made by defendant to officer Maison.

Defendant next contends that he was deprived of his right to due process and a fair trial when the prosecutor, in her closing argument, referred to facts which were not part of the testimonial record made at trial. During her closing argument, the prosecutor made a brief reference to a blue "blazer" parked in the driveway of codefendant Joseph Stachowiak's house at the time defendant arrived at Stachowiak's house. There was no testimony presented during trial to the effect that a blue blazer was, in fact, parked in Stachowiak's driveway.

We initially note that defendant failed to timely object to the comment made by the prosecutor. Therefore, appellate review is foreclosed unless the prejudicial effect was so great that it could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v. Foster*, 175 Mich. App. 311, 317; 437 NW2d 395 (1989). A miscarriage of justice will not be found if any

prejudicial effect could have been eliminated by a timely instruction, had one been requested. *People v. Gonzalez,* 178 Mich. App. 526, 535; 444 NW2d 228 (1989), lv den 434 Mich. 909 (1990).

We do not believe that the prejudicial effect of the prosecutor's comment was so great that it could not have been cured by an appropriate cautionary instruction. It is true that a prosecutor may not argue facts material to the case which are not in evidence, *People v. Dalessandro,* 165 Mich. App. 569, 581; 419 NW2d 609 (1988). However, the comment of the prosecutor was brief and isolated, amounting to a minor error which did not deny defendant a fair and impartial trial. *Foster,* p. 317. Furthermore, the trial court instructed the jury that the lawyers' statements and arguments were not evidence, and that it should only consider evidence that was properly admitted. This curative instruction eliminated any potential prejudice, and defendant was not denied a fair and impartial trial.

Defendant also claims that the trial court erred when it allowed into evidence the contents of a telephone conversation between officer Maison and codefendant Stachowiak, because

the statement was hearsay not within MRE 801(d)(2)(E). Defendant contends that the prosecution failed to establish by a preponderance of the evidence that a conspiracy existed between defendant and Stachowiak, independent of the hearsay statement. We disagree with defendant.

The decision whether to admit evidence is within the sound discretion of the trial court, and it will not be disturbed on appeal absent an abuse of discretion. *People v. Watkins*, 176 Mich. App. 428, 430; 440 NW2d 36 (1989). A statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party made during the course and in furtherance of the conspiracy, or independent proof of the conspiracy. MRE 801(d)(2)(E). Before the statements can be admitted, there must be proof of a conspiracy by independent evidence. *People v. Vega*, 413 Mich. 773, 780; 321 NW2d 675 (1982). The existence of a conspiracy or concert of action must be proven by a preponderance of the evidence independent of the coconspirator's statements. *Id.*, pp. 780, 782.

It is well-settled that admissions and statements are admissible against another defendant if there exists a concert of

action between the defendants and the statements are made while the common scheme or plan is still in effect. *People v. Ayoub,* 150 Mich. App. 150, 152; 387 NW2d 848 (1985), lv den 425 Mich. 868 (1986); *People v. Nelson,* 168 Mich. App. 781, 791; 425 NW2d 225 (1988). The testimony in the present case, independent of the statements made by Stachowiak, indicated that when defendant and Stachowiak made their rendezvous with officer Maison, Stachowiak was driving defendant's car, and defendant was riding in the passenger's seat. Stachowiak pulled defendant's car alongside of officer Maison's car, with the drivers' doors facing each other. Officer Maison watched defendant remove two "cello" baggies containing cocaine from the glove box and hand them to Stachowiak. Defendant then took a third baggie from inside one of the car speakers and gave it to Stachowiak. Defendant next pointed to the other car speaker, and Stachowiak removed therefrom a fourth baggie containing cocaine. Stachowiak then left defendant's car and handed the four baggies to officer Maison. A prearranged signal was then given, and the backup police moved in and arrested defendant and Stachowiak.

We are convinced that the above evidence was sufficient to justify the trial court's ruling that the prosecution established, by a preponderance of the evidence, that defendant and Stachowiak were engaged in a common scheme or concert of action to sell cocaine. Having established independent proof of a conspiracy, the statements of the coconspirator made during the course and in furtherance of the conspiracy were properly admitted. *People v. Rockwell,* 188 Mich. App. 405, 408; 470 NW2d 673 (1991). We find no abuse of discretion on this record.

Affirmed.

/s/ Myron H. Wahls
/s/ Kathleen Jansen
/s/ Thomas G. Kavanagh

Order

Entered: April 30, 1993

94928

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 94928
COA: 130466
LC: 88-1682-FH

MARK CRAYTHORN THOMPSON,

Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

90427

Seal

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

_____, 19__

_____
Clerk